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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 338.

CARROLL FRANKLIN JOHNSTON, an Infant, By Rebecca L. German, His Next Friend and Guardian, and REBECCA L. GERMAN, in Her Own Right, *Petitioners*,

v.

W. F. JOHNSTON, MAMIE L. JOHNSTON, LUCY J. IDEN, ET ALS., *Respondents*.

BRIEF OF RESPONDENTS OPPOSING PETITION FOR CERTIORARI.

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BRIEF OF RESPONDENTS OPPOSING PETITION FOR CERTIORARI.

To the Honorable, The Chief Justice of the United States, and the Justices of the Supreme Court of the United States:

The respondents submit this, their brief, in opposition to the granting of a writ of Certiorari to the Supreme Court of Appeals of Virginia pursuant to a petition filed on August 12, 1944.

STATEMENT OF THE CASE.

The petition and supporting brief contain statements of the facts and pleadings of the case, and we find it undesirable to make any further detailed statement thereof. There are certain facts and circumstances not dealt with in the petitioners statement which we shall, for the sake of clarity and convenience, postpone until we deal with the same under the several divisions of our argument.

ARGUMENT.

1.

Petitioners Failed to Cause Timely Service of Notice of Filing Petition for Certiorari on Counsel for Respondents.

It will be seen from the records of the clerk of this court that the petition for certiorari was filed on August 12, 1944. Service of notice of filing the petition together with copies of the petition, printed record and supporting brief was accepted by one of counsel for respondents on August 28, 1944.

Rule 38 (3) of the Rules of the Supreme Court provides:

> "Notice of the filing of the petition, together with a copy of the petition, printed record and supporting brief, shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court, or a justice thereof when the court is not in session), and due proof of service shall be filed with the clerk."

While we find no judicial authority to the effect that this rule is mandatory, it seems to us that the use of the word "shall" in describing the duties of the petitioner is a clear indication that the framers of the rule so intended. This has been so universally held to be true that we deem it unnecessary to cite any authority to that effect.

Ordinarily we should be most hesitant to raise such a point, but there are some features of the case which influence us in this respect.

This litigation has been pending for almost six years. The suit was commenced November 30, 1938. (R. 13.) Naturally the respondents, brothers and sisters of the decedent, have been continuously embarrassed by the seemingly endless publicity attending the long continued attempts of petitoners to assert their alleged rights; but of perhaps greater importance is the fact that the properties of the estate of Allen Johnston, deceased, have been held in uncertain tenure pending the final outcome of this litigation. The estate, of course, cannot be settled pending the outcome of the suit.

For these reasons we feel justified in urging this court to dismiss the petition.

2.

This Court is Without Jurisdiction Because No Federal Questions Were Raised or Constitutional Guaranties Invoked in the Courts Below.

The jurisdiction of this court is invoked by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Sec. 344, (Petitioners Brief p. 12), which provides:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States, *or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution.*" * * * (Italics supplied.)

Neither in the petition nor in petitioners brief is it set forth that any federal questions were raised or constitutional guaranties invoked by petitioners in the courts below of first and last resort. A reading of the record will disclose that, in fact, no such questions were ever before either of said courts, and that the petition for certiorari and brief submitted in this court by petitioners contain the first references to any such questions. In none of the pleadings in the Circuit Court of Fauquier County, nor in either of petitioners petitions for appeal to the Supreme Court of Appeals of Virginia, were any federal questions raised or Constitutional guaranties invoked.

It has been invariably held by this Court that federal questions not presented prior to the decision by the Court of last resort of the state will not be considered on a petition for writ of error or certiorari. *Mallers* v. *Commercial Loan etc. Co.*, 216 U. S. 613; 30 S. Ct. 438; 54 L. Ed. 638; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; 30 S. Ct. 693; 54 L. Ed. 895. It must affirmatively appear that the state court of last resort had the federal questions before it and passed directly upon them; and this, even though the federal question should be raised on a petition for review which was denied. *Chicago etc. R. Co.* v. *McGuire*, 196 U. S. 128; 25 S. Ct. 200; 49 L. Ed. 413.

The only exception to the general rule which we can find is a case where the petitioner prevailed in the court of first resort, whose decision was later reversed in the state court of last resort. This Court in the case of *Grannis* v. *Ordean*, 234 U. S. 385; 34 S. Ct. 779, 782, held that where the Constitutional right was not infringed until the judgment of the state court of last resort, and petitioner raised the federal question on a petition for reargument in that court which considered the federal question in denying the petition, the Supreme Court had jurisdiction.

In the instant case the petitioners did not prevail in the Court of first resort. The Court sustained respondents' demurrrer to petitioners' amended bill. (R. 97.) Petition-

ers' first petition for appeal contained no reference to any federal question. (R. 1-13.) The final judgment of the court of first resort denied petitioners any relief and entered final judgment against them. (R. 196, 197.) Petitioners' second petition for appeal raised no federal question. (R. 102-132.) There was no petition for a rehearing presented to the Supreme Court of Appeal of Virginia. In short, the federal questions sought to be raised by petitioners here have never been considered by any of the Courts below. The petitioners' are not seeking a review of the decision of the Court below but are raising entirely new questions. Section 237 of the Judicial Code, *supra*, does not grant to this Court the power to consider such questions. As was said in *Mutual Life Ins. Co. of New York* v. *McGrew*, 188 U. S. 291; 313; 47 L. Ed. 480, 486.

> "We cannot retain jurisdiction on the ground of the assertion of a Federal right which * * * was not brought to the attention of the highest Court of the state *in any way whatever.*" (Italics supplied).

We, therefore, respectfully submit that the petition for certiorari should be denied.

3.

This Court is Without Jurisdiction Because There Are No Federal Questions Involved in the Case.

The petition contains six different questions for consideration (P. 6-10) none of which involves any federal question or any constitutional guaranty which would be the subject of jurisdiction of this Court. We shall consider these questions in the order and under the designations contained in the petition and petitioners' brief.

(A)

Petitioners' say in effect that the judgment of the Virginia Appellate Court deprived the petitioners of their property without due process of law and denied them the

equal protection of the laws in violation of the Fourteenth Amendment.

It is plain from petitioners statement that the error assigned relates to a *finding of fact* by the Circuit Court of Fauquier County, Virginia, which was later affirmed by the appellate court.

A casual reading of the record will disclose that under the facts of the case no court could have justly found that a common law marriage existed between Allen Johnston and Rebecca Edmonds (Now German). But, assuming that the facts were sufficient to justify such a finding and that the offspring of the relationship between those people was legitimatized by virtue of Section 5270 of the Virginia Code, there is nothing in the petition or brief to the effect that petitioners were deprived of their property without due process of law or that they were denied the equal protection of the laws of Virginia. They had their day in Court and their evidence was submitted and duly considered. It is certainly not within the province of this Court to review the decisions of State Courts on questions of fact. The case of *Meister* v. *Moore*, 96 U. S. 76, 24 L. Ed. 826, cited by petitioners, does not sustain such a contention. That case involves only the construction of the marriage statutes of Michigan.

(B)

It is urged by petitioners that the opinion of the Supreme Court of Appeals of Virginia is in conflict with the weight of authority including the decision of this Court in *Meister* v. *Moore, supra.*

Petitioners say that the effect of the Virginia court's decision in this case was to invalidate common law marriages in Virginia and that the Virginia marriage statutes should not be so construed because the weight of authority in other states is to the contrary. It is tacitly admitted that the Virginia Courts have invariably held that the Virginia marriage statutes preclude any valid common law marriage, and this is indeed true. *Offield* v. *Davis,* 100 Va. 250; 40

S. E. 910. It is interesting to note that petitioners did not urge in either of the Courts below that a common law marriage is valid in Virginia.

The construction of the Virginia statute by the State Court of last resort is binding upon this Court, *Gatewood* v. *North Carolina*, 203 U. S. 531; 27 S. Ct. 167; 51 L. Ed. 305, and petitioners do not urge that Virginia has no power to prescribe the requirements of a valid marriage within her jurisdiction. The opinion in the case of *Meister* v. *Moore, supra*, carefully limits the application of the holding to cases where the State Court has not construed the statute and says: "No doubt, a statute may take away a common law right." * * *

(C)

If we understand their contention correctly, petitioners urge that the Virginia Court erred in construing the Virginia statutes to invalidate common law marriages as discussed under Topic (B), and, further, that the Court erred in holding that Section 5270 of the Virginia Code did not legitimatize the issue of a marriage which might have been valid under the common law.

Even if the Court had so held, no federal question would have been presented, but such was not the case.

It was freely admitted that had the petitioners been able to establish all of the facts necessary to prove the existence of a common law marriage between Allen Johnston and Rebecca Edmonds, the offspring would have been legitimatized under the Virginia statute (Virginia Code Section 527). This point was settled in the case of *McClaugherty* v. *McClaugherty*, 21 S. E. (2) 761, 180 Va. 51.

The only question decided by the Court of first resort in its final judgment was that under the facts of the case the petitioners "have wholly failed to establish the existence of any common law marriage." (R. 197.) The Supreme Court of Appeals affirmed that judgment because it was of the opinion that the same was "plainly right." (R. 197.)

(D)

Under this topic the petitioners urge that the effect of the alleged erroneous holdings of the Virginia Court set forth under Topics (C) and (D) was to deprive the petitioners of their property without due process of law.

There is no contention that petitioners were not afforded their day in Court or that there was any irregularity in the proceedings in the Virginia courts. All of petitioners' evidence was submitted and considered by the Court, which found that such evidence was insufficient to establish the existence of a common law marriage.

Such a situation can give rise to no federal question which would subject this case to review by this Court.

(E)

This contention seems to us to be identical to the one raised in Topic (C) and we shall content ourselves with a reference to our discussion there.

(F)

Petitioners here contend that the Virginia Court failed to give effect to the state statute legitimatizing the issue of void marriages which resulted in denying to petitioner's the equal protection of the laws.

As we have seen the state statute was construed to legitimatize the infant petitioner, Carroll Franklin Johnston, in the event that a common law marriage between his parents could be established. The Court found as a matter of fact that no such marriage existed, and he could not under any flights of the imagination have been denied the equal protection of the laws.

CONCLUSION.

As we have seen, there were no federal questions raised or constitutional guaranties invoked in the Courts below; nor are there any federal questions involved in the case.

We, therefore, respectfully submit that the Court should deny the petition for certiorari to the Supreme Court of Appeals of Virginia.

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